eme Court, U. S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

80-249

NO. .....

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

JOHN V. SCHARA and MARDELL SCHARA,

Petitioners,

-vs-

THE ANACONDA COMPANY, a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF FOR THE RESPONDENT IN OPPOSITION

URBAN L. ROTH, ESQ.
Poore, Roth, Robischon & Robinson, P.C.
1341 Harrison Avenue
Butte, Montana 59701
406-792-1223
Attorneys for Respondent

NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

JOHN V. SCHARA and MARDELL SCHARA,

Petitioners,

-vs-

THE ANACONDA COMPANY, a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Does the Petition define a federal question?

2. Whether the lower court's decision confirming Anaconda's[a] right to condemn the Scharas' land for the purpose of depositing refuse from Anaconda's mine requires this court to rule upon the constitutionality of subsection (15) to 70-30-402, Montana Code Annotated.

3. Whether this Court will sit as a super-legislature to weigh the wisdom of Montana's classification denying to coal companies the right to condemn land for open-pit mining.

4. Whether the Scharas have standing to challenge the constitutionality of subsection (15) to 70-30-102, Montana Code Annotated.

---

[a]Petitioners, John V. And Mardell Schara, will be referred to as "Scharas," and Respondent, The Anaconda Company, will be referred to as "Anaconda."

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

	Page
QUESTIONS PRESENTED FOR REVIEW	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

Table of Cases

	Page
American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900)	5, 7
Ashwander v. T.V.A., 207 U.S. 288 (1936)	7
Baldwin v. Montana Fish & Game Commission, 436 U.S. 37 (1978)	9
Berea College v. Kentucky, 211 U.S. 45 (1980)	7
Clark v. Nash, 198 U.S. 361 (1904)	9
District of Columbia v. Little, 339 U.S. 1 (1950)	7
Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112	9
Furgeson v. Skrupa, 372 U.S. 726 (1963)	9
McGowan v. Maryland, 366 U.S. 420 (1961)	9
New Orleans v. Duke, 472 U.S. 297 (1976)	8
Old Dearborn Distributing Co. v. Seagrass, 299 U.S. 183 (1936)	6
Rescue Army v. Municipal Court, 331 U.S. 549 (1947)	7
Soon Hing v. Crowley, 113 U.S. 703 (1885)	6, 9
Southern Railway Co. v. Greene, 216 U.S. 400 (1910)	6
Stanton v. Stanton, 421 U.S. 7 (1975)	6
Strickley v. Highland Boy Gold Mining Company, 200 U.S. 527 (1905)	9
Sutton County v. Nichols, 152 Cal. 688, 93 P. 872	9
Trimble v. Gordon, 430 U.S. 762 (1977)	5, 6

Table of Federal Statutes:

	Page
Act of August 3, 1977, P. L. 45-87, Title VII, '§714, 91 Stat. 524, 30 U.S.C. 1304	7

Table of Montana Statutes:

	Page
Section 70-30-102(5), Montana Code Annotated	7, 9
Section 70-30-102(11), Montana Code Annotated	7
Section 70-30-102(15), Montana Code Annotated	ii, 3, 6, 7, 10
Section 70-30-106(1), Montana Code Annotated	7
Section 70-30-106(3), Montana Code Annotated	7
Sections 70-30-301 to 70-30-312, Montana Code Annotated	9
Section 70-30-402(15), Montana Code Annotated	ii

Table of Supreme Court Rules:	Page
Rule 17	4
Rule 17.1(b)	5
Rule 17.1(c)	5
Rule 21.1(c)(e)i and ii	2
Rule 21.1(h)	2

Miscellaneous Citations:	Page
1974 Survey, Montana Bureau of Mines and Geology	7
Keystone Coal Industry Manual (1974)	7
1, Nichols on Eminent Domain, 3rd Edition, §4.15	9

STATEMENT OF CASE

Anaconda conducts a large open-pit mining operation in Butte-Silver Bow, Montana. As ore deposits are depleted within the present Berkeley Pit, Anaconda's operations require expansion of the pit and acquisition of additional lands upon which to dump refuse. Anaconda commenced this eminent domain action to acquire land upon which to dump:

> "Plaintiff operates an open-pit copper mine in Butte-Silver Bow, Montana. In conjunction with the mining operation, Plaintiff also maintains dump sites at which it disposes of waste materials from the mining operation. In expanding its operations, the 2.2704 plus acres of land described in Exhibits 'A,' 'B,' and 'C,' attached hereto and made a part hereof, are necessary for 'road,' 'ditches,' 'dumping places,' 'deposit * * * of refuse matter' from its mines, and for the location of an 'electric power line' used in conjunction with the Plaintiff's mine. (Section 93-9920(5), (11), R.C.M., 1947) (Now 70-30-102(5) and (11), M.C.A.)
>
> * * *

Plaintiff is granted the power of eminent domain by the folowing laws: Section 15-2204(d), R.C.M., 1947 (now 35-1-108(d), M.C.A.) Sections 93-9901 to and including 93-9926, R.C.M., 1947 (now 70-30-101 to and including 70-30-109, M.C.A.).

* * *

> Accordingly, Plaintiff hereby seeks to condemn and acquire all of the Defendants' estate and interest in and to the 2.2704 plus acres of land described in the attached Exhibits 'A,' 'B,' and 'C' and any interest Defendants may have in the property described in Exhibit 'D,' including any easements or rights-of-way connected therewith, for the purpose of maintaining 'roads,' 'ditches,' 'dumping places,' 'deposit * * * of refuse matter' from its mines, together with the right to enter upon and occupy all of said land.' " (Paragraphs II, V, and VI, Anaconda's Amended Complaint; parenthetical words and figures added.)

The Scharas did not raise any constitutional issue in their Answer to the Amended Complaint.[1]

Through pre-trial discovery and trial testimony, it was developed that Anaconda was not intending to, nor would it, "mine" or "extract" any "ores, metals, or minerals" from beneath the surface of the Schara lands:

> "Interrogatory No. 8: State in detail what use is contemplated to be made of Defendants' property.
>
> Answer No. 8: Dump, utilities corridor, ditch, heavy equipment access.
>
> * * *

[1]In conjunction with other procedural deficiencies (See, e.g., Rule 21.1(c)(e)i and ii.), the Petition does not specify the "stage in the proceedings" at which "the federal questions * * * were raised" or the "manner" in which they were raised (Rule 21.1(h)).

"Interrogatory No. 10: State if Plaintiff intends to extract ore or minerals from beneath the surface of Defendants' land.

Answer No. 10: No." (Plaintiff's Answers to Defendants' Interrogatories, p. 3)[2]

On appeal, Anaconda continued to assert its right to condemn the Scharas' lands for a refuse "dump," a diversion water ditch, utility corridor, and heavy equipment access. (Anaconda's Brief to Montana Supreme Court, pp. 14-16, 26, and 31) The Scharas also recognized that their lands are non-mineral and would only be utilized as a refuse dump:

"The Respondents' (Scharas') property is non-mineral (Tr. 296) and will be used only for dumping of overburden after the year 1984 (Tr. 142). The dump on the Columbia Gardens of about 26 acres will accommodate 2½ million tons and have a height of about 100 feet (Tr. 142)." (Scharas' Brief to Montana Supreme Court., pp. 3-4)

The lower court's opinion reflects the fact that Anaconda was not acquiring the Scharas' lands "to mine and extract ore, metals, or minerals owned by the Plaintiff located beneath or upon the surface of property where the title to said surface rests in others" (70-30-102(15), M.C.A.; Petition, p. 3; Appendix B, pp. 35-36):

"Anaconda instituted a condemnation proceeding against the Scharas to acquire their land for the purpose of establishing a dumping site for mining waste." (Petition, Appendix A, p. 14).

---

[2]See also Answers No. 5, 6, 25, 27, and 135 to Defendants' Second Interrogatories; Answers no. 9, 12, 13, 14, 25, and 27; testimony of William Thompson, Tr., pp. 77, *et seq.*

SUMMARY OF ARGUMENT

1. Rule 17 of this Court's revised rules suggests the character of reasons which may convince this Court to grant review. The Scharas' Petition for Certiorari fails to cite any decisions which conflict with the lower court's resolution of the constitutional challenge. It also fails to define any federal question and should, therefore, be summarily denied.

2. Denial of the Petition also follows from application of the rule that this court will not decide a constitutional issue when the decision reaches by the lower court could be affirmed upon non-constitutional grounds. In this case, the Scharas attack the constitutionality of a Montana statute which withholds condemnation powers from open-pit coal miners but extends that power to other kinds of open-pit mine operations. However, that section of the statute was never relied upon by Anaconda. Anaconda's right to condemnation can be confirmed by a separate provision of Montana law which pertains to the deposit of refuse from mines and which makes no distinction between coal and other types of mining activities. The constitutionality of this subsection is not challenged, and, therefore, review is inappropriate.

3. Clearly, the classification created between open-pit coal mines and open-pit non-coal mines is a matter of purely state interest and does not rise to constitutional proportions. Montana has specifically addressed the reasons why open-pit or strip coal mine operations require disparate treatment. Having predicated the classification upon economic, environmental, and state policy reasons, this Court's refusal to sit as a superlegislature and weigh the wisdom of such legislation clearly prevents review of the challenged statute.

4. The Scharas have not suffered any

discrimination by these condemnation proceedings. They have the same right to due process and just compensation as all other surface land owners overlying non-coal mineral lands. The Scharas have failed to define any palpable injury which would give them standing to challenge the specified provision of Montana law, and for that reason also, review should be denied.

ARGUMENT

1. Rule 17.1(c), in partially characterizing some of the reasons which may move this Court's discretion in favor of review, provides "when a state court * * * has decided a federal question in a way in conflict with applicable decisions of this court."[3] However, the Scharas have failed to cite to the court any decisions which conflict with the lower court's decision. The cases upon which the Scharas rely are either inapposite to the facts or question raised here or support the lower court's resolution of that question.

American Sugar Refining Co. v. *Louisiana*, 179 U.S. 89 (1900) (Petition, p. 6), upheld the constitutionality of statutes which distinguished between refiners of sugar for self-use and those who engage in a general sugar refining business. This decision, together with citations upon which this Court relied, reflect no federal issue and fully support the lower court's ruling.

Trimble v. *Gordon*, 430 U.S. 762 (1977) (Petition, p. 6), struck down a state statute which denied an illegitimate child the right to inherit property because

[3]It is assumed that the Scharas seek to fit their Petition under this criterion because they have failed to cite any decision with which the lower court's decision conflicts (Rule 17.1(b)), nor do they argue that an important question of federal law, which has not been, should be settled by this Court (Rule 17.1(c)).

the state could not establish a nexus between legislative goals and the discriminatory classification. *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (Petition, p. 7), is inapposite for the same reasons — aside from the distinction that both *Trimble* and *Stanton* involved purely personal rights. In this case, the legislative goals (Petition, Appendix, pp. 25-26) clearly link up with the separate classification created for coal mining.

Old Dearborn Distributing Co. v. *Seagrass*, 299 U.S. 183 (1936) (Petition, p. 7), is more closely analogous but actually upheld the constitutionality of legislative classifications which were reasonable, not arbitrary, and rested upon some ground of difference having fair and substantial relation to the objects of the legislation, i.e., assistance to the agricultural segment of the economy. (*Id.*, p. 197)

Soon Hing v. *Crowley*, 113 U.S. 703 (1885) (Petition, p. 7), articulates the very reason why there is no federal question raised: Persons engaged in the same business, e.g., open-pit coal miners, are treated the same and subjected to the same restrictions. (*Id.*, p. 709). It was because foreign railroads engaged in precisely the same business as domestic railroads but were subjected to a separate tax that led this Court to strike down Alabama's statue in *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 418 (1910). But compare cases cited at pp. 413-416, which are analogous to the legislative classification involved here.

The Scharas have not cited to this Court a single decision which creates a federal question. Indeed, Scharas' citations reflect a faithful application of constitutional principles by the lower court and do not call for review.

2. The Scharas challenge the constitutionality of 70-30-102(15) (Petition, p. 3), which witholds the

power of eminent domain to remove strata or overburden to extract coal but extends it to those who mine or extract other minerals. Anaconda did not exercise the power of eminent domain under subdivision (15) but, rather, under subdivisions (5) and (11). (*Infra*, pp. 1-3.) In light of that uncontrovertable fact, the lower court was not required to address the constitutional issue, and its decision can be sustained on non-constitutional grounds. See *District of Columbia* v. *Little*, 339 U.S. 1, 3-4 (1950); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 and footnote 33 (1947); *Ashwander* v. *T.V.A.*, 207 U.S. 288, 347 (1936); *Berea College* v. *Kentucky*, 211 U.S. 45, 53 (1980). Therefore, review is not appropriate.

3. The Montana Legislature clearly articulated the reasons why strip and open-pit mining of coal would not support eminent domain proceedings. The legislature stated that because of the large land areas overlying coal, widespread strip and open-pit coal mining could be destructive of underground acquifers and water courses and would affect "large areas of land and large numbers of people." (70-30-106(1), M.C.A.; Petition, Appendix, pp. 25-26)[4] Compare *American Sugar Refining Co.* v. *Louisiana*, *supra*, 170 U.S. at 95. The very magnitude of "potential coal development * * * will subject landowners to undue harassment by excessive use of eminent domain." (70-30-106(3), *supra*) It was to prevent this type of environmental, social, and

---

[4]Coal fields underly approximately 35 percent of Montana's total land area. (1974 Survey, Montana Bureau of Mines and Geology) Total coal reserves in Montana are estimated at 222 billion tons. Reserves likely to be found in areas as yet unmapped and unexplored could increase the total reserves to 378 billion tons. (Keystone Coal Industry Manual, p. 514 (1974)) Additionally, Congress has distinguished between coal mined by underground and other than underground techniques. (Act of August 3, 1977, P. L. 45-87, Title VII, §714, 91 Stat. 524, 30 U.S.C. 1304)

economic damage that condemnation for open-pit or strip coal mining activities was proscribed. The nexus between the created classification and the legislative goal is obvious, rational, and reasonable.

In *New Orleans* v. *Duke*, 472 U.S. 297, 303-304 (1976), this Court set down the constitutional standard by which Montana's statute is measured:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L.Ed.2d 351, 93 S.Ct. 1001 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, Katzenbach v. Morgan, 384 U. S. 641, 16 L.Ed.2d 828, 86 S.Ct. 1717 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488-489, 99 L.Ed. 563, 75 S.Ct. 461 (1955). *In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor*

proceed along suspect lines, see, e.g., Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 96 L.Ed. 469, 72 S.Ct. 405 (1952); *in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.* See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 732, 10 L.Ed.2d 93, 83 S.Ct. 1028, 95 A.L.R.2d 1347 (1963)." (Emphasis supplied.)

Section 70-30-102(5), when set against applicable criteria, passes constitutional muster. See also *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S. 37 (1978); *Ferguson* v. *Skrupa,* 372 U.S. 726, 730, 732 (1963); *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961). The fact that Montana's legislature has declared mining a public use but, in doing so, excluded open-pit coal mining is clearly within their descretion. Cf. *Strickley* v. *Highland Boy Gold Mining Company,* 200 U.S. 527 (1905); *Fallbrook Irr. Dist.* v. *Bradley,* 164 U.S. 112; *Clark* v. *Nash,* 198 U.S. 361, 369 (1904); *Sutton County* v. *Nichols,* 152 Cal. 688, 93 P. 872; 1, *Nichols on Eminent Domain,* 3rd Edition, §4.15, pp. 4-232 - 233. These authorities reflect there is no federal question to review.

4. Scharas are surface landowners who are accorded and who have exercised due process rights to defeat Anaconda's condemnation action. The lower court decided in favor of Anaconda, and now the Scharas are entitled to just compensation. Montana law carefully protects this right, including the right to trial before a jury of peers. See 70-30-301 to 70-30-312, M.C.A. The Scharas occupy precisely the same position as do other owners of land overlying similar mineral deposits. Cf. *Soon Hing* v. *Crowley, supra,* 113 U.S. at 708-709; see also pp. 5-8, *infra,* and authorities cited.

Petitioners are members of a class, all of whom receive even treatment. The Scharas did not define any interest which creates standing to challenge 70-30-102(15).

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED this 17th day of September, 1980.

POORE, ROTH, ROBISCHON & ROBINSON

By_____

Attorneys for Respondent, The
Anaconda Company
1341 Harrison Avenue
Butte, Montana 59701